

JEFF MOULTON, Regional Attorney
ROSE MIKSOVSKY
JOSHUA RIDER
Staff Attorneys
U.S. Department of Agriculture
Office of the General Counsel
33 New Montgomery St., 17th Floor
San Francisco, CA 94105
Telephone: (415) 744-3011
FAX: (415) 744-3170

Attorneys for Petitioner
U.S. Department of Agriculture, Forest Service
Eldorado National Forest

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

In the Matter of Cleanup and Abatement Order)	PETITION FOR REVIEW
No. R5-2009-0030)	
)	
)	

The United States Department of Agriculture, Forest Service, Eldorado National Forest ("Petitioner") files this petition for review of Cleanup and Abatement Order No. R5-2009-0030 issued on April 23, 2009 by the California Regional Water Quality Control Board, Central Valley Region ("Regional Board"). This petition for review is filed pursuant to the Clean Water Act ("CWA"), 33 U.S.C. §§1251-1387; 16 U.S.C. §551; 16 U.S.C. §§1604 and 1613; California Water Code ("CWC") §13320; and 23 California Code of Regulations ("CCR") §§2050 et seq. A copy of the Order is attached as Exhibit A.

I. Name and Address of Petitioner

The Petitioner can be contacted through its counsel of record.

II. The Regional Board Action for Which This Petition For Review is Sought

The Regional Board action for which this petition is filed is the issuance of a document entitled "Cleanup and Abatement Order No. R5-2009-0030" dated April 23, 2009 ("Order"). The Petitioner and El Dorado County ("County") are the named dischargers and responsible parties ("Responsible Parties or Responsible Party") in the Order.

III. The Date the Regional Board Acted

The Regional Board Executive Officer issued the Order on April 23, 2009.

IV. Statement of the Reasons the Action is Inappropriate and Improper

A. The Petitioner is inappropriately and improperly named in the Order as a Responsible Party. The Regional Board issued the Order pursuant to a provision in CWC §13304(a),¹ and the Order alleges that the Petitioner has caused or permitted, or threatens to cause or permit, a condition of pollution and nuisance based upon public motorized use of the Rubicon Trail.² Neither this CWC provision nor the Order is within the scope of the United States' waiver of sovereign immunity under the CWA, because (a) the Petitioner does not own, operate, or maintain the Rubicon Trail; (b) the Order is not based upon any activity conducted by the Petitioner (the Order is based upon activities of the County and the public); and (c) the Order does not identify, or allege that the Petitioner has violated, any state requirements for the control and abatement of water pollution. The term "requirements" within the meaning of this waiver of sovereign immunity refers only to objective and precise water quality standards that are capable of uniform application. The Order does not demonstrate that the Petitioner is in violation of any water quality standards or requirements. The Order does not require a cleanup and abatement action. Instead, the Order requires the Petitioner to undertake land management activities on National Forest System ("NFS") lands that must be approved by the Regional Board. Therefore, this particular provision of the CWC and this Order do not fall within the scope of the waiver of sovereign immunity in the CWA. Because the United States did not waive sovereign immunity with respect to this provision of the CWC and this Order, the Regional Board had no jurisdiction to name the Petitioner as a Responsible Party.

B. The Petitioner does not own, operate, or maintain the Rubicon Trail, which is the subject of the Order, and thus has no right, power, or duty to conduct the actions required by the Order. Therefore, the Regional Board's naming of the Petitioner as a Responsible Party is arbitrary, capricious, and contrary to law.

C. The Order directs the Petitioner to undertake land management activities that must be approved by the Regional Board. The Order directs the Petitioner to undertake land management activities that are within the sole discretion of the Petitioner. Federal law and CWC §13304(a)

¹ The Regional Board's Order erroneously cites to CWC §13304(c)(1) as the basis of the Order. The text of §13304 set forth in Paragraph 26 of the Order is found in CWC §13304(a), and not, as the Regional Board states in the Order, in §13304(c)(1). This petition uses the correct citation to the CWC.

² The Petitioner also objects to being named as Responsible Party because it does not own, operate, or maintain the Rubicon Trail, and therefore is not a Responsible Party within the meaning of the CWC for any discharges emanating from the Rubicon Trail.

limit the Regional Board's authority to the cleanup and abatement of water pollution. The Regional Board issued the Order in excess of its authority under state and federal law.

D. The Rubicon Trail crosses both NFS lands and private lands. The Petitioner was named in the Order based upon the United States' status as a landowner. The Order does not distinguish between NFS lands and private lands, but rather orders the Petitioner to prepare and implement management plans and take actions for the "Rubicon Trail," regardless of its location. The Petitioner does not have the legal authority to take any action with respect to the private lands. Because the Order did not name similarly situated private landowners, the Regional Board's action is arbitrary, capricious, and contrary to law.

V. Petitioner is Aggrieved.

The Petitioner is aggrieved for the reasons set forth in paragraph IV above. The Petitioner is further aggrieved because the Order requires the Petitioner to expend time and resources to perform activities on and in connection with the Rubicon Trail, a facility that the Petitioner does not own, operate, or maintain. Therefore, the Petitioner is being directed to take actions that it has no legal authority to take.

VI. Petitioner's Requested Action by the State Board.

The Petitioner respectfully requests that the State Board modify the Regional Board's Order identified above, pursuant to Title 23 CCR §2052(a)(2)(B), to remove the Petitioner as a Responsible Party from the Order or to direct the Regional Board to take this action itself pursuant to §2052(a)(2)(C), so that the Order is directed solely to the County as the Responsible Party.

VII. Interested Parties

The Hearing Procedures for the April 23 Regional Board meeting at which this Order was adopted did not specifically identify any interested parties. The notice of the adopted Order did not specifically identify any interested parties.

VIII. Statement That Petition Sent to Regional Board and County

A copy of this petition has been sent to the Regional Board, attention Ms. Pamela Creedon, Executive Officer, Regional Water Quality Control Board, Central Valley Region, 11020 Sun Center Drive No. 200, Rancho Cordova, CA 95670-6114.

A copy of this petition has also been sent to the County, the other named Responsible Party, in care of Mr. Ed Knapp, Chief Assistant County Counsel, El Dorado County, 330 Fair Lane, Placerville, CA 95667.

IX. Statement That Issues Were Raised Below

All substantive issues and objections raised by this petition were raised before the Regional Board in written comments accepted into the record or oral testimony presented at the April 23, 2009, hearing on the Order, or the Petitioner was not required to raise them, or was unable to raise them below because the Petitioner was unaware of them and could not have reasonably been aware of them in time to raise them before the Regional Board, or because the Regional Board arbitrarily curtailed the amount of time the Petitioner was given to raise issues before the Regional Board.

X. Request for Preparation of the Regional Board Record

Attached as Exhibit B is a copy of the letter to the Regional Board requesting preparation of the Regional Board record, including a copy of the tape recording of the Regional Board action or a transcript, if available.

XI. Request for a Hearing

The Petitioner requests a hearing for the purpose of responding to State Board questions regarding any facts or legal issues raised in this petition.

XII. Statement of Points and Authorities

A. INTRODUCTION

In an Order dated April 23, 2009, the Regional Board named the Petitioner and the County as Responsible Parties. The Order directs the Petitioner and the County to jointly manage and maintain a portion of the Rubicon Trail within El Dorado County, consisting of 14 miles of unpaved roads, to address the threat of pollution or nuisance from discharge of sedimentation, human waste, and petroleum spills resulting from motorized Off Highway Vehicle ("OHV") use by the public on the Rubicon Trail by undertaking land management activities and developing a maintenance and management plan for the trail. The Petitioner does not have the legal authority to take the actions that the Regional Board directs in its Order with respect to the Rubicon Trail; the Rubicon Trail is owned, operated, and maintained by the County, not the Petitioner. The Regional Board does not have the legal authority to order the Petitioner to undertake land management activities.

The Petitioner recognizes that the CWA has a waiver of sovereign immunity that requires the Petitioner to comply with California state law requirements and administrative authority respecting the control and abatement of water pollution in the same manner, and to the same extent, as any nongovernmental entity. However, this is a limited waiver of sovereign immunity, and any waiver is to be strictly construed in favor of the United States.

For the reasons stated below, the Order and the nuisance/pollution portion of CWC §13304(a) are outside the scope of the CWA's waiver of sovereign immunity. The Petitioner does not have jurisdiction or control over the County's right-of-way known as the Rubicon Trail. The Order does not identify any activity that the Petitioner conducts that results in the discharge or runoff of pollutants. The CWA regulates discharges of pollutants affecting water quality based upon articulated water quality standards and requirements. The Order does not demonstrate that the Petitioner has violated water quality standards or requirements for either point or nonpoint source discharges. The Order does not state that the Petitioner has violated any of the CWC's nonpoint source requirements, such as failing to obtain a waste-discharge permit or a waiver. The Order does not direct the Petitioner to attain any specific cleanup level. Instead, it directs the Petitioner to develop maintenance and management plans for the trail and to conduct management and enforcement activities. Because the Order does not demonstrate that the Petitioner has violated any definable water quality standards and requirements that must be met, the Order and its underlying statutory provision fall outside the scope of the CWA's waiver of sovereign immunity. Because the United States has not waived its sovereign immunity, the Regional Board had no jurisdiction to name the Petitioner as a Responsible Party in the Order.

The Order directs the Petitioner and the County to "cease the discharge of sediment and other wastes due to motorized use of the Rubicon Trail." Even if the United States had waived its sovereign immunity with respect to the issues identified in the Order, the Petitioner does not own, operate, or maintain the Rubicon Trail and has no right, power, or duty to conduct the actions required by the Order. Therefore, the Regional Board's decision to name the Petitioner as a Responsible Party is arbitrary, capricious, and contrary to law.

The Regional Board exceeded its authority by naming the Petitioner as a Responsible Party and by issuing the Order. The Order directs the Petitioner to undertake management actions to manage and control public use on the Rubicon Trail, which must be approved by the Regional Board. The Order directs the Petitioner and the County to jointly prepare a Rubicon Trail Saturated Soil Water Quality Protection Plan and address water quality effects caused by vehicle use, including a seasonal closure and the use of law enforcement; a 2009 Maintenance Training Plan to train volunteer groups to do trail maintenance projects; and a Long Term Maintenance Plan that includes a user trail count, documentation of the location of the trail, use of portable human waste collection devices, reducing the number of people on the trail, the cleanup of oil spills on the trail, and law enforcement. In addition, the Order directs the Petitioner to "identify the exact location of the trail." Although the Order is ostensibly framed as a cleanup and abatement action, the Order actually directs the Petitioner's management of NFS lands and land management activities. Under federal law, the management authority for these NFS lands rests solely with the Petitioner. The Regional Board does not have the jurisdiction or authority to issue an Order that seeks to direct, oversee, or approve the Petitioner's management of NFS lands.

Finally, the Order is arbitrary and capricious because it identifies and requires abatement of conditions of pollution from public use of the Rubicon Trail on those portions of the Trail that

cross private lands.

B. FACTUAL BACKGROUND

The Rubicon Trail is an internationally known, historic OHV route in the Sierra Nevada Mountains. It crosses NFS lands and private lands in El Dorado and Placer Counties. It ranges in condition from a well-defined dirt road to granite domes, ledges, and rock debris. The Order is directed to the portion of the Trail that crosses NFS lands and private lands in El Dorado County.

The Rubicon Trail is not an NFS road or trail. The Rubicon Trail is not managed or maintained by the Petitioner. The Rubicon Trail is a County road that is owned and operated by the County, and has been since its creation in the 1800s.

The Rubicon Trail was created by the public pursuant to federal Revised Statute (RS) 2477 in the 1880s as a road through the Sierra Nevada Mountains. In 1887, pursuant to RS 2477, the County issued a declaration asserting a right-of-way over the Rubicon Trail. On May 30, 1989, the County adopted Resolution 142-89, reaffirming its 1887 declaration. Thus, for more than 100 years, the County has asserted that the Rubicon Trail is a County road.

Under both federal law and California law, RS 2477 rights are property rights akin to an easement, and the County is responsible for the management and maintenance of the Rubicon Trail. Although the County alleges RS 2477 rights for the entire Trail, the Forest Service and the County had some questions about whether the segment known as the Ellis Creek Intertie was originally part of the Trail. Further, the County desired to reroute part of the Ellis Creek Intertie. To resolve these issues, the Forest Service issued the County an easement in 2004 under the Federal Roads and Trails Act for the segment of the Ellis Creek Intertie that is located on NFS lands. The easement provides that the County is responsible for trail maintenance. The County also has an easement from the private landowner along this segment of the Trail.

The County manages and maintains the Rubicon Trail. The County obtained OHV grant funds from the State of California that it has used to maintain, repair, and clean up the trail, and to purchase personal sanitation units and spill kits to distribute to trail users. Volunteers conduct repair and maintenance work under County oversight in the form of the Rubicon Oversight Committee. Although the County intended to issue a management plan for the Trail and completed a Draft Environmental Impact Report, it stopped the process because of a lack of funds.

The Petitioner's management of NFS lands on the Eldorado National Forest excludes management of the Rubicon Trail. In 2008, the Petitioner completed a Final Environmental Impact Statement and issued its travel management Record of Decision designating the NFS roads, trails, and areas that are open for motor vehicle use on the Eldorado National Forest. This designation was done pursuant to 36 C.F.R. Part 212, Subpart B. The Forest Service's travel

management regulations are limited to NFS roads, trails, and areas, and specifically exclude “a road [or trail] which has been authorized by a legally documented right-of-way held by a State, county, or other local public road authority.” 36 C.F.R. §212.1. Because the Rubicon Trail is a County road, the Petitioner’s travel management decision did not designate the Trail as open to the public for motorized use.

The Petitioner published its motor vehicle use map in April 2009. The publication of this map completed the designation process under 36 C.F.R. Part 212, Subpart B. Any person operating a motor vehicle on an NFS road, NFS trail, or area within the Eldorado National Forest that is not designated as open is subject to criminal citation under 36 C.F.R. §261.13, unless otherwise exempt. One of the exemptions is the “use of a road or trail that is authorized by a legally documented right-of-way held by a State, county, or other local public road authority.” 36 C.F.R. §261.13(i). The Rubicon Trail is shown as a County road on the Petitioner’s motor vehicle use map. Therefore, motor vehicle use on the Trail is not subject to 36 C.F.R. § 261.13.

C. PROCEDURAL BACKGROUND

On January 23, 2009, the Regional Board issued a draft Cleanup and Abatement Order (draft Order 1) for public comment. The named discharger in draft Order 1 was the County. The public comment period closed on April 1, 2009. The comments the Petitioner provided to the Regional Board on April 1, 2009, were based upon the contents of draft Order 1. On April 2, 2009, the Petitioner and attorneys for the Petitioner had a conference call with the Regional Board staff and legal counsel, who informed the Petitioner that it would be issuing a revised draft Order (draft Order 2) naming the Petitioner as well as the County. The Petitioner objected on procedural and substantive grounds. The Regional Board staff informed the Petitioner that it was being named as a Responsible Party because the United States owned the lands underlying the Trail and on either side of the Trail. The Petitioner pointed out that the Trail crosses private lands. On that basis, the Petitioner noted that, if the Petitioner were named as a Responsible Party in the Order, the Order would also have to name the private landowners.

The Regional Board staff allowed the Petitioner just one day to provide supplemental comments to draft Order 2. The Petitioner objected that it was not afforded the same due process rights as the County had received. Specifically, the Regional Board gave the County more than 60 days to comment and provide evidence. As a result of this disparate treatment, the Petitioner had one day to prepare and provide supplemental comments, which it did on April 3, 2009.

On April 10, 2009, the Regional Board issued draft Order 2 naming the County and the Petitioner as Responsible Parties. Draft Order 2 was significantly different from draft Order 1. The Petitioner, the County, and the Regional Board staff met on April 15 to discuss draft Order 2. The Petitioner raised the issues discussed in this petition. The Regional Board issued a third revised draft Order (draft Order 3) on April 17. A fourth revised draft Order (draft Order 4), was issued on April 22. Draft Order 4 was presented to the Regional Board at its meeting on April 23 for adoption. It was calendared as a contested matter. Hearing Procedures were issued and the

designated parties (the Regional Board, County, and Petitioner) and the public were allowed to provide evidence and testimony.

After listening to public comments on April 23, 2009, the Regional Board issued a final Order that revised draft Order 4. This Order directs the Petitioner and the County to jointly manage the portion of the Rubicon Trail that is located within El Dorado County to address the threat of pollution or nuisance from sedimentation, human waste, and petroleum spills from the Rubicon Trail.

D. THE PETITIONER HAS NOT WAIVED ITS SOVEREIGN IMMUNITY BECAUSE THE ORDER AND THE PROVISIONS OF STATE LAW THAT THE ORDER IS BASED UPON FALL OUTSIDE THE SCOPE OF THE CLEAN WATER ACT'S WAIVER OF SOVEREIGN IMMUNITY

The Order falls outside the scope of the CWA's waiver of sovereign immunity for two separate and independent reasons. First the Petitioner does not own, operate, or maintain the Rubicon Trail and the Order is not based upon any activity conducted by the Petitioner. Second, the Order does not identify, or allege that the Petitioner has violated, any state requirements for the control and abatement of water pollution. A detailed discussion of these issues follows.

CWC §13304(a), which is the basis of the Order, is within the division of the CWC entitled the Porter-Cologne Water Quality Control Act. CWC §13020. This Act applies to the United States, and to federal agencies, only to the extent authorized by federal law. CWC §13050(c).

Under the Supremacy Clause of the United States Constitution, states may not regulate the federal agencies or its installations and activities without express Congressional authority. McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819). Stated another way, the federal government is not subject to state law, absent an express Congressional waiver of sovereign immunity. Mayo v. United States, 319 U.S. 441, 445 (1943); U.S. v. State of Wash., 872 F.2d 874, 877 (9th Cir. 1989). A waiver of sovereign immunity must be clear, unequivocal, and unambiguous on the face of the statute. United States Dep't of Energy v. Ohio, 503 U.S. 607, 615 (1992). Waivers of sovereign immunity are strictly construed in favor of the federal government and may not be enlarged beyond the clear language of the applicable statute. Id.

The CWA's waiver of sovereign immunity, 33 U.S.C. § 1323(a), provides in relevant part:

Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control

and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. . . .

The CWA's waiver of sovereign immunity is limited to a facility under the jurisdiction and control of a federal agency. The Petitioner does not own, operate, or maintain the Rubicon Trail. The Rubicon Trail is a county road for which the County has easements under various authorities for the portions crossing NFS lands. The County has the sole authority to manage and control the Rubicon Trail's use as a public highway. When the Petitioner made its travel management decision authorizing motorized use on the Eldorado National Forest, it specifically excluded the Rubicon Trail because the County, not the Petitioner, controls and manages the Trail. Therefore, the Order improperly holds the Petitioner responsible for a facility that it does not operate or maintain. 36 C.F.R. §212.1.

The Order provides that the Petitioner and the County "share primary responsibility for maintenance and management of the Trail." Cleanup and Abatement Order, ¶ 20, at 6. The Regional Board's finding is legally incorrect. The Rubicon Trail is a County road operated by El Dorado County, and the County is therefore responsible for its maintenance. The Petitioner no more operates the Rubicon Trail than it does Interstate 80 or State Highway Route 50, both of which cross NFS lands within a short distance of the Rubicon Trail and both of which are operated pursuant to easements across the underlying federal lands. It is unimaginable that the Regional Board, if faced with similar issues of sedimentation, petroleum run-off, and human waste associated with the use of these roads, would name the Petitioner as a discharger rather than the governmental entities that operate and maintain these facilities. The Regional Board's failure to analyze the legal status of the Rubicon Trail, the County's and the Petitioner's assertions in this regard, as well as the parties' course of conduct with respect to the Trail has resulted in an Order that incorrectly names the Petitioner as a discharger pursuant to CWC §13304(a). The Order imposes heavy burdens on the Petitioner to prepare plans to address actions for which it has no responsibility and no power to control.

The Order clearly addresses itself to the use and maintenance of the Rubicon Trail as the source of its jurisdiction:

27. The Rubicon Trail is not adequately drained and maintained. Runoff from the trail has discharged, and has the potential to discharge sediment and other waste into waters of the state. There are human sanitation problems, soil contamination from metals, and water contamination from petroleum-based fluids. Thus, the Responsible Parties have caused or permitted waste to be discharged or deposited where it will be, or has the potential to be, discharged to waters of the state. The Responsible Parties have created or

threaten to create a condition of pollution or nuisance.

29. The technical reports required by this Order are necessary to assure compliance with this Order, and to protect human health and the environment. Existing data and information about the site indicates that waste has been discharged and will continue to be discharged along the Rubicon trail, which is currently managed by the Responsible Parties.

It Is Hereby Ordered that pursuant to CWC sections 13304 and 13267, Eldorado County and the Eldorado National Forest (hereafter "Dischargers" or "Responsible Parties") shall jointly cleanup and abate impacts resulting from OHV use of the Rubicon Trail in accordance with the scope and schedule set forth below.

1. The Responsible Parties shall take all reasonable steps to cease the discharge of sediment and other wastes due to motorized use of the Rubicon Trail to waters of the state, including discharges to Gerle Creek, Ellis Creek, Loon Lake and its tributaries, and to the Rubicon River and its tributaries. . . .

Cleanup and Abatement Order, at 6-8.

As noted above, the Regional Board staff initially directed its order only to the County as the operator of the Rubicon Trail. Quite late in the process the County made a series of novel assertions regarding its rights and responsibilities concerning the Rubicon Trail, particularly in regards to RS 2477. County Comments entitled "Legal Issues Raised by the Draft Cleanup and Abatement Order for the Rubicon Trail, El Dorado County" dated March 25, 2009 (hereafter "County Comments"). These assertions were at odds with the County's previous public assertions regarding the Rubicon Trail as a County road, as well as with the County's course of conduct over the previous 120 years. See, for example, Letter from Jack Sweeney, County Supervisor, dated January 9, 2002 attached hereto as Exhibit C. Subsequently, the Regional Board named the Petitioner as well as the County in its Order. The Regional Board should have evaluated the County's last-minute assertions and determined that the County and not the Petitioner is responsible for the Rubicon Trail.

The entirety of the Regional Board's analysis of the legal status of the Rubicon Trail consists of the following portions of the Order:

4. Pursuant to federal Revised Statute 2477, El Dorado County (County) asserted a right-of-way over federal land through an 1887 declaration; this right-of-way is known as the Rubicon Trail. In its adoption of Resolution 142-89 on 30 May 1989, the El Dorado County Board of Supervisors reaffirmed the 3 August 1887 declaration, and declared the Rubicon Trail is a non-maintained public road in El Dorado County. The portion of the trail from Airport Flat Campground to Wentworth Springs Campground has been accepted into the County's maintained road system. For the Ellis Creek Intertie portion

of the trail, the County has been granted deeded easements by the U.S. Forest Service and a private property owner.

20. Due to the 1887 RS 2477 declaration (mentioned in finding 4, *supra*) the Forest Service claims it has limited ability to regulate El Dorado County's activities on this road, and therefore El Dorado County is responsible for operations and maintenance of the Trail. El Dorado County makes similar claims relative to its responsibility of the Trail, stating that because it does not hold a property interest in the trail, all of the activities it has thus far undertaken on the Trail have been completely voluntary. However, from the perspective of the Central Valley Water Board, it is clear that these two parties share primary responsibility for maintenance and management of the Trail.

21. A legal easement for the Rubicon Trail has not been recorded except for the portion from the Loon Lake Dam to near Ellis Creek (know as the Ellis Creek Intertie). Other than the Ellis Creek Intertie, the exact location and width of the Rubicon Trail has not been fully defined.

Cleanup and Abatement Order, at 2, 6.

The Regional Board's conclusory assertion that the Petitioner shares "primary responsibility for maintenance and management of the Trail," is not supported by the law or facts in the record, and it is not the proper inference even from its own limited discussion quoted above.

The Rubicon Trail is a County Highway according to both state and federal law, and its operation and maintenance is the responsibility of El Dorado County. Under federal law, El Dorado County has accepted an offer of an RS 2477 right-of-way, and with it the control and responsibility of an easement holder. This alone should be sufficient for the Board to find that the County and not the Petitioner is the discharger with respect to the Rubicon Trail. Nevertheless, the operation of state law makes clear that the County accepted the federal government's offer of dedication, and that the Rubicon Trail is a County Highway. Thus, the County is responsible for its maintenance.

The County's contention that it is not entirely responsible for the Rubicon Trail rests on the assertions that it has no property interest in the Trail, and that the Trail has not been formally added to the County "maintained" road system thus limiting its power under state law to perform maintenance on the Trail. County Comments. With respect to the first point, as discussed more fully below, the County has an interest in property, an easement, for the entire length of the Rubicon Trail. As to the second point, the Petitioner notes that the phrase "County maintained road system" does not appear in the relevant State law, which speaks only of a "County road system." The difference is significant because state law imposes an obligation on the Board of Supervisors to maintain all roads necessary for public convenience once accepted by the County by action of the Board of Supervisors. California Streets and Highways Code §941. The

County's 1887 declaration, its 1989 reassertion, and its course of conduct over the intervening century are all actions by the Board of Supervisors sufficient to make the Rubicon Trail a County Highway.

As noted in the Order, the County contends that the status of the Rubicon Trail varies over its length. However, as demonstrated below, all the various segments remain the responsibility of the County.

1. Airport Flat Campground to Wentworth Springs Campground

The County's contention that it is not entirely responsible for the Rubicon Trail can have no bearing on that portion of the Trail that has explicitly been added to the County maintained road system. This is the case for the Rubicon Trail from Airport Flat Campground to Wentworth Springs Campground, as noted in the Order, ¶ 4, at 2. For this portion of the Trail, the Petitioner bears no maintenance responsibility. The responsibility has been assigned to the County by its own action and the underlying State law. The provisions of State law in this regard are clear as shown by the following sections of the California Streets and Highways Code:

§25(b): As used in this code, "county highway" means any highway which is: Laid out or constructed by others and dedicated or abandoned to or acquired by the county.

§940: Boards of Supervisors shall have general supervision, management, and control of the county highways.

§941(a): Boards of supervisors shall, by proper order cause those highways which are necessary to public convenience to be established, recorded, constructed and maintained in the manner provided in this division.

The County's 1887 declaration made the Rubicon Trail a County Highway prior to the creation of the Eldorado National Forest. The declaration was an acceptance of dedication of a road constructed by others by the Board of Supervisors, and this is sufficient to make it a County Highway. The Petitioner has never had responsibility for the use and management of this County Highway. Even the County admits that this section of the Rubicon Trail is part of its "maintained" road system. See Cleanup and Abatement Order ¶ 4, at 2. The County has no power to cease maintenance or abandon this Highway without following the process of State law. Cal. Sts. & High. Code §§901, 954, 954.5, and 954.6.

Because the Order addresses concerns with the use and maintenance of the Rubicon Trail, and because the use and maintenance of the Airport Flat Campground to Wentworth Springs Campground trail segment is entirely the responsibility of the County, the Petitioner should not be named in the Order with respect to this portion of the Trail.

2. The Ellis Creek Intertie

In contrast to its conclusory assertion that the Petitioner bears shared responsibility for the entirety of the Rubicon Trail, the Regional Board's limited discussion recognizes that the Ellis Creek Intertie segment of the Trail has a distinct legal status.

In 2004, because of the County's desire to relocate portions of its historic right-of-way, as well as questions about the inclusion of the Ellis Creek Intertie in the 1887 declaration, the Petitioner issued the County an easement pursuant to the Forest Road and Trails Act (FRTA) (16 U.S.C. §§532-538) for those portions of the Ellis Creek Intertie that cross NFS lands. Evidence of this easement was before the Regional Board, yet it seems not to have been considered in the Order. The 2004 easement, like any easement, is an interest in real property. Cal. Civil Code §801; Elliot v. McCombs, 17 Cal.2d 23 (1941). Once granted, this easement, like any easement, restricts the rights of the grantor to interfere with the use of the rights granted. Cal. Civil Code §809; Nadersson v. Southern California Edison Co., 77 Cal. App. 328 (App. 1 Dist. 1926). The FRTA easement transferred to the El Dorado County Department of Transportation "an easement for a public road and highway." FRTA Easement issued to the County on September 3, 2004. These terms are clearly defined by federal law: The term "public road" means any road or street under the jurisdiction of and maintained by a public authority and open to public travel." 23 U.S.C. §101(a)(27). The term "public authority" means "a Federal, State, county, town, or township, Indian tribe, municipal or other local government or instrumentality with authority to finance, build, operate, or maintain toll or toll-free facilities." 23 U.S.C. §101(a)(23). This grant precludes the Petitioner from interfering with the use of the Ellis Creek Intertie as a public road open to public travel. The road is under the jurisdiction and control of the County. These rights and the accompanying responsibilities lie with the County.

The grant includes a legal description of the easement's length and width, and a map of the easement location. The easement makes the County responsible for maintenance of the road and directly addresses the concerns raised by the Order. Specifically,

The County shall:

"protect and preserve soil and vegetative cover and scenic and esthetic values on the right-of-way outside of construction limits," and,

"provide for the prevention and control of soil erosion within the right-of-way and adjacent lands that might be affected by the construction, operation or maintenance of the highway, and shall vegetate and keep vegetated with suitable species all earth cut or fill slopes feasible for revegetation or other areas on which ground cover is destroyed," and

"also shall maintain all terracing, water bars, leadoff ditches, or other preventive works that shall be necessary to accomplish this objective."

FRTA Easement issued to the County on September 3, 2004.

By accepting the easement, the County explicitly accepted responsibility for the Ellis Creek Intertie, even if the County failed to enroll the road in its "maintained" system. California law recognizes that federal grants of roadways, once accepted by the County, become County Highways and that the County has all the normal rights and responsibilities for them. Cal. Sts. & High. Code §978. Further, the County's acceptance of the easement makes clear that it was "acquired by the county" under California Streets and Highways Code §25(b) because it was approved by the County's Board of Supervisors. Therefore, the County's acceptance of the easement is sufficient to make this a County Highway with attendant maintenance responsibilities under state law. Cal. Sts. & High. Code §941(a). Thus, as with the Airport Flat to Wentworth Springs trail segment, the Ellis Creek Intertie is entirely the responsibility of El Dorado County. By the terms of the easement, the Petitioner has no right to regulate the use of the road or any responsibility to maintain it. These powers reside with the County as the holder of the road easement. Thus, it is inappropriate for the Order to name the Petitioner as a discharger with respect to the Ellis Creek Intertie.

3. Portions of the Rubicon Trail that cross private lands

The Order further fails to recognize that the Petitioner has no rights or responsibilities for the portions of the Rubicon Trail that cross private lands. The Petitioner holds no easement for the Rubicon Trail. Even if all of the Petitioner's other arguments fail, its rights and responsibilities for the Rubicon Trail are limited to those portions that cross NFS lands. It has no right to perform, or to authorize others to perform, maintenance work on the portions of the Rubicon Trail that cross private property. Nor could it authorize or prohibit use of the Rubicon Trail on private lands. All of these powers lie entirely with the County and the private landowners. Because the Petitioner does not own, operate, or maintain the portions of the Rubicon Trail that are located on private lands, the Order erroneously names the Petitioner as a discharger with respect to those portions of the Trail.

4. Portions of the Rubicon Trail crossing NFS lands pursuant to RS 2477

The Petitioner is not a discharger in regards to the portion of the Rubicon Trail that crosses NFS lands. Although this situation is more complex, the law and facts show that the Rubicon Trail is a County Highway, and thus the responsibility of the County. The County attempts to avoid this conclusion with distinctions that are not supported by the law. In regards to RS 2477, the County asserts that the rights created by this statute bypass local authorities and vest directly in the public, that the statute does not transfer an interest in property, and that the right-of-way does not impose any maintenance requirements on the holder. County Comments. As discussed below, each of these assertions has been rejected by federal and California Courts. Once created, the RS 2477 right-of-way functions as any other grant of a public road easement--it conveys a real property interest and the accompanying rights and responsibilities for operation and maintenance of a public road to a local authority, just as would a Forest Road and Trails Act easement. An RS 2477 right-of-way is simply an unrecorded easement across the federal lands, not some mysterious and ineffable entity.

The County's arguments concerning the limitations of its State law powers and responsibilities are equally suspect. This is confirmed by an examination of the history of RS 2477, the plain language of RS 2477, and cases interpreting the rights granted under RS 2477. In 1866, in the midst of an era of federal land grant statutes aimed at facilitating the settlement of the American West, Congress passed RS 2477 as a means of providing public access across unreserved public domain lands. See Pamela Baldwin, Highway Rights of Way: The Controversy Over Claims Under R.S. 2477, U.S. Cong. Research Serv. Reports No. 93-74A at 10-18 (Jan. 15, 1993); see also Central Pac. Ry. Co. v. Alameda County, 284 U.S. 463, 472-73 (1932). From its 1866 enactment until its repeal in the Federal Land Policy Management Act in 1976, the statute provided, in its entirety: "The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." R.S. § 2477; 43 U.S.C. § 932 (1970) (repealed 1976). The creation of an RS 2477 right-of-way required no formalities, and no recordation by the federal government or by the state or local recipients of the rights. S. Utah Wilderness Alliance v. Bureau of Land Mgmt., 425 F.3d 735, 754 (10th Cir. 2005). An RS 2477 right-of-way could come into existence automatically, without the need for formal action by public authorities, whenever the public sufficiently indicated its intent to accept the land grant by establishing a public highway across public lands in accordance with state law. See Standage Ventures, Inc. v. Arizona, 499 F.2d 248, 250 (9th Cir. 1974). This lack of documentation, however, is the limit of RS 2477's mysteries. There is no question as to the nature of the rights created by RS 2477 rights-of-way, who may hold them, or the responsibilities assumed by the holder of an RS 2477 right-of-way. Nor is there any doubt as to the prevailing law governing these questions; while federal law often borrows from state law to provide detail, it must be in service of federal policy or functions. S. Utah Wilderness Alliance, 425 F.3d at 747.

The lack of formalities in creating an RS 2477 right-of-way can create controversy as to the right-of-way's existence or exact location, which can lead to Quiet Title actions in Federal Court. In the case at hand, however, the County and the Forest Service agree that the Rubicon Trail is an RS 2477 right-of-way, and this administrative determination is all that is necessary.

The County's assertions that no property interest is created by an RS 2477 right-of-way are incorrect. Federal Courts consistently refer to the rights granted by RS 2477 as rights-of-way or easements, interchangeably: "A right of way is not tantamount to fee simple ownership of a defined parcel of territory. Rather, it is an entitlement to use certain land in a particular way." S. Utah Wilderness Alliance, 425 F.3d at 747. "The holder of a right of way, private or public, cannot lawfully take the dominant possession and deal with the land upon which the easement exists . . ." United States v. Garfield County, 122 F. Supp. 2d 1201, 1242 (D. Utah 2000) (emphasis added) (internal quotation marks omitted). "By its express terms, R.S. § 2477 grants a right-of-way, a species of easement across the public lands of the United States." Id. "Even if the [plaintiffs] had an easement under R.S. 2477, they would still be subject to reasonable Forest Service regulations." Adams v. United States, 3 F.3d 1254, 1258 n.1 (9th Cir. 1993).

Although the property interest created is less than a fee simple ownership, easements are interests in property. To the extent the County relies on cases in Quiet Title that find no standing for claimants of RS 2477 rights of way for the proposition that no property rights are created, it

relies solely on cases brought by members of the public. County Comments at 10. Those cases are routinely dismissed because RS 2477 rights do not vest in the public but in governmental authorities. Quiet Title cases brought by governmental authorities are not so dismissed because governmental entities may properly claim the rights transferred by RS 2477. See, e.g., Wilderness Society v. Kane County, 470 F. Supp. 2d 1300 (D. Utah 2006); see also, Long v. Area Manager, 236 F.3d 910, 915 (8th Cir. 2001) (“The proper plaintiff to challenge the condemnation of a public road is the governmental entity that owns the easement.”).

Federal Courts have consistently found that rights in these public highways vest in local or state authorities who manage them. Courts have specifically found that individual members of the public, or public groups, do not have title to the RS 2477 roads. California law agrees. The County’s assertions that the road rights are held directly by the public rather than by the County do not survive scrutiny. It is well settled that a mere right or interest in the use of a public road or highway does not constitute an interest in title to property. See Kinscherff v. United States, 586 F.2d 159, 160 (10th Cir. 1978) (holding that the “interest” of the plaintiffs, as members of the public, in the use of the Jemez Dam Road “is not an interest in real property contemplated by [the Quiet Title Act]” because “[i]f it exists, it is vested in the public generally”); see also Staley v. United States, 168 F. Supp. 2d 1209, 1213 (D. Colo. 2001) (“The Court refuses Plaintiffs’ invitation to blur the lines between a title interest and a right of access to a public road.”). Courts have routinely examined and dismissed suits brought by members of the public to enforce RS 2477 rights-of-way. See Long, 236 F.3d at 915 (“[T]he right of an individual to use a public road is not a right or interest in property for purposes of the Quiet Title Act.”).

A recent case from California is directly on point. In Friends of Panamint Valley v. Kemphorne, 499 F. Supp. 2d 1165 (E.D. Cal. 2007), property owners both individually and through an association brought a Quiet Title Act action against the United States asserting that they had a right, as members of the public, to use and maintain the Surprise Canyon Road in Death Valley National Park as an R.S. 2477 right-of-way. After reviewing R.S. 2477, the Quiet Title Act, and prior case law addressing this issue from both from federal and California courts, the federal district court agreed with holdings in other circuits that, “[T]he right of an individual to use a public road is not a right or interest in property for purposes of the Quiet Title Act.” Id. at 1175 (quoting Long, 236 F.3d at 915). Therefore, the court dismissed the suit. Id. at 1179.

Under California law, RS 2477 public highway rights-of-way are “owned” by a public entity, namely the State of California and its political subdivisions as agents of the State. California Courts have found, “In strictness, all public highways belong to the state, which holds them for public use subject to legislative control. In this commonwealth their custody and control . . . is confided to the supervisors of the several counties.” County of Marin v. Superior Court of Marin County, 349 P.2d 526, 529 (Cal. 1960) (quoting People v. County of Marin, 103 Cal. 223, 232 (1894)). Further, “For all intents and purposes . . . the public entity ‘owns’ the public streets and highways.” Cox Cable San Diego v. County of San Diego, 185 229 Cal. Repr. 839, 848 (Cal. Ct. App. 1986). Consequently, it is these public entities, not members of the public, that may properly assert claims against the United States to use and maintain RS 2477 roads. Individuals cannot usurp the duties and responsibilities of elected officials and adjudicate

title to RS 2477 public highways. Only public officials may speak for the public in this manner. See Union Transp. Co. v. Sacramento County, 267 P.2d 10, 15 (Cal. 1954) (“[A]lthough elected officials are merely agents of the public, they are the only means by which the public may act [regarding public roads].”). This is in addition to the portions of the California Streets and Highways Code already cited, which give custody and control of all County Highways to the Board of Supervisors. Cal. Sts. and High. Code §§25, 900, 901, and 941(a).

Under both California and federal law, the holder of an easement has an obligation to use and maintain it in such a way as to not cause unnecessary damage to the underlying and surrounding estate. See Crease v. Jarrell, 224 P. 762 (Cal. 1924) (holding that it is the duty of the owners of an easement to keep it in repair); Mehdizadeh v. Mincer, 54 Cal. Rptr.2d 284, 291 (1996) (“The owner of the dominant tenement must use his or her easements and rights in such a way as to impose as slight a burden as possible on the servient tenement.” (quoting Scruby v. Vintage Grapevine, Inc., 43 Cal. Rptr. 2d 810, 813 (1995))); S. Utah Wilderness Alliance, 425 F.3d at 747 (“The principle that the easement holder must exercise its rights so as not to interfere unreasonably with the rights of the owner of the servient estate, derives from general principles of the common law of easements”). The owner of the servient estate has an obligation to allow the easement to be used for the purposes for which it was granted.

These considerations show that the County is responsible for the operation and maintenance of all of the portions of the Rubicon Trail that it claims pursuant to RS 2477. RS 2477 operated as an offer of easement to the local authorities. The County accepted that easement through the actions of its Board of Supervisors. Easements are interests in property, and carry maintenance responsibilities. This easement was separated from the federal estate prior to the creation of the Eldorado National Forest, and the Petitioner has no right or power to deny the use of the easement to the County. Thus, by operation of federal law, the County and not the Petitioner is the operator of the Rubicon Trail, and the proper subject of the Order. State law also commands this conclusion. As the County recognizes, RS 2477 operates as an express offer of dedication. W. Aggregates, Inc. v. County of Yuba, 130 Cal. Rptr. 2d 436 (2002). This offer of dedication was accepted both by the public use, and by the County, through the Board of Supervisor’s 1887 declaration. By state law this was sufficient to vest the County with an easement for the Rubicon Trail and make it a County Highway. Cal. Sts. and High. Code §25. Once a County Highway, the County had an obligation to maintain it and has never abandoned or relinquished it. Cal. Sts. and High. Code §§25, 900, 901, and 941(a). To the contrary, the County reaffirmed its claims to the Rubicon Trail and expended funds on its maintenance. Under both federal and state law, the Rubicon Trail was and is a County road and therefore the County is responsible for maintaining it. Because the Rubicon Trail is a County Road that is operated and maintained by the County, the Petitioner is not a discharger within the terms of the Order.

The County’s attempts to resist this conclusion are unavailing. To the extent that it relies on an assertion that it has never adopted the Rubicon Trail into its “maintained” road system, this assertion is incorrect for portions of the Rubicon Trail. Further, as noted above, under state law there is no “county maintained road system,” only a “county road system.” Cal. Sts. and High. Code §§25 and 941. The County relies entirely on its assertion that the Board of Supervisors has

not accepted the Rubicon Trail into the County road system, but fails to explain why the 1887 declaration does not meet the requirements of the relevant code section: "No public or private road shall become a county highway until and unless the board of supervisors, or its designee, by appropriate action, has caused the road to be accepted into the county road system." Cal. Sts. and High. Code §941(b). The 1887 declaration was made pursuant to a public process and described the entire length of the Rubicon Trail. Nothing more was required to make it a County Highway, for which the Board of Supervisors is responsible. The law the County quotes to the contrary relies on cases in which the Board of Supervisors failed to act or refused an offer of dedication. County Comments at 12-13. Here, we have not just one but two public actions by the Board asserting its claim to the Rubicon Trail, as well as its actions to expend public funds for the maintenance of the Trail. Given the popularity and amount of traffic on the Rubicon Trail, it qualifies as "necessary to public convenience," under State law, which independently obligates the Board of Supervisors to act to make it a County Highway. Cal. Sts. and High. Code §941(a). Finally, the County has by its own admission expended public funds in the maintenance of the Rubicon Trail, which requires the Trail to be a County Highway. 4 Op. Atty. Gen. 114 ("If the convenience of the public requires work to be done at public expense on a public road other than a state highway or a city street, it should be adopted as a county highway and thereafter maintained as such.").

By operation of both federal and state law, the Rubicon Trail is a County Highway under easement to the County. The Regional Board's findings in this regard are incorrect, and its Order should not have named the Petitioner as a discharger.

The Regional Board's Order also improperly names the Petitioner as a Responsible Party because the Clean Water Act's waiver of sovereign immunity is limited to facilities that are under the jurisdiction and control of a federal agency, and to activities of a federal agency that result, or may result, in the discharge or runoff of pollutants. The Order does not identify, nor is it based upon, any activities conducted by the Petitioner that result in the discharge or runoff of pollutants. Rather, the Order is based upon the public's motorized use of the Rubicon Trail, and this use is managed and controlled by the County. Waivers of sovereign immunity must be strictly construed in favor of the Petitioner. Thus, any issue as to whether the Order falls within the scope of the CWA's waiver of sovereign immunity must be resolved in favor of the Petitioner. The Order does not identify, and is not based upon, discharges or runoff of pollution from a facility that is owned, operated, or maintained by the Petitioner, or by the Petitioner's activities. Consequently, the Order falls outside the waiver of sovereign immunity in the Clean Water Act. As a result, the Regional Board had no jurisdiction to name the Petitioner as a Responsible Party in the Order.

The Order falls outside the waiver of sovereign immunity in the CWA for a separate and independent reason. Specifically, the CWA's waiver of sovereign immunity is limited to compliance with state and local requirements for the control and abatement of water pollution. However, the Order does not require and is not based upon state and local requirements for the control and abatement of water pollution.

The United States Supreme Court has held that the "requirements" language of the waiver

provisions of the CWA and § 118(a) of the Clean Air Act refer only to objective state standards of control. EPA v. California ex. Rel. State Resources Control Board, 426 U.S. 200, 215 (1976) (legislative history of §1323(a) of the CWA suggests that the “requirements” language refers only to substantive “effluent limitations and standards and schedules of compliance”), and Hancock v. Train, 426 U.S. 167, 187-89 (1976) (legislative history of §118 of the Clean Air Act suggests that the “requirements language refers only to emissions standards and compliance schedules”). The 1977 amendment to §1323(a) of the CWA did not change the extent of the waiver of sovereign immunity, but simply made clear that if federal agencies are subject to state or local regulation, they must comply with procedural and substantive requirements. United States ex rel. TVA v. Tennessee Water Quality Control Board, 717 F.2d 992 (6th Cir. 1983), cert. denied, 466 U.S. 937 (1984). Moreover, §1329(1) of the CWA, which addresses nonpoint source pollution, ties the state’s regulation of nonpoint source pollution to attaining and maintaining water quality standards.

In Kelley v. United States, 618 F.Supp. 1103 (W.D. Mich. 1985), the State of Michigan brought suit against the United States based upon CWA claims. The State alleged that the Coast Guard had released toxic chemicals into the ground that contaminated the groundwater. The State brought claims for alleged violations of two state statutes. One of the state statutes made it unlawful to “discharge into the waters of the state any substance which is or may become injurious to the public health, safety or welfare[.]” and violation of that statute constituted “prima facie evidence of the existence of a public nuisance.” The other state statute provided that the State Attorney General and others could maintain actions “for the protection of the air, water and natural resources and the public trust therein from pollution, impairment or destruction.” The United States contended that the claims were barred by sovereign immunity. Kelley at 1107-1108.

The district court found that the “requirements” language in the CWA’s waiver of sovereign immunity, as well as other federal statutes with similar waivers, meant relative and precise standards that were capable of uniform application. Id. at 1108. The district court found that Michigan’s statutes did not provide objective, quantifiable standards subject to uniform application. The district court also found that neither of the state statutes constituted “requirements” for the purposes of the CWA. The district court dismissed the State’s claims, holding that the federal government did not consent to be sued under these statutes. Id. at 1108.

In Center for Native Ecosystems v. Cables, 509 F.3d 1310 (10th Cir. 2007), the plaintiffs alleged that the Forest Service’s issuance of annual operating instructions for grazing was arbitrary and capricious under the Administrative Procedure Act and violated §3313(a) of the CWA because nonpoint source pollution had resulted in levels of fecal-coliform bacteria that violated regulations issued by the State of Wyoming. The central issue in this case was what a party must do to comply with Wyoming’s water quality requirements. The Wyoming statutory provision read in relevant part: “The numerical and narrative standards contained within these regulations [which include the fecal-coliform standard] shall be used to establish effluent limitations for those discharges requiring control via permits . . . in the case of point sources and

best management practices in the case of nonpoint sources.” The Forest Service maintained that it had complied “to the same extent as any nongovernmental entity” because it was implementing best management practices. *Id.* at 1331-1332. The district court agreed with the Forest Service. It found that Wyoming controlled nonpoint source violations of water-quality standards with the implementation of best management practices, and that it did not require that implementation of best management practices for nonpoint source pollution lead to water-quality readings that meet all applicable standards. The district court held that, because the Forest Service had implemented Wyoming’s best management practices, it had complied with State requirements regarding the control and abatement of water pollution in the same manner and to the same extent as any nongovernmental entity. *Id.* at 1331-1333.

The CWC section that is relied upon in the Order is almost identical to the Michigan statutes at issue in Kelley. Specifically, the following excerpt from the Order provides the legal basis for the Order:

26. CWC section 13304(c)(1) [sic 13304(a)] provides that:

Any person who has discharged or discharges waste into waters of this state in violation of any waste discharge requirements or other order or prohibition issued by a Regional Water Board or the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the Regional Water Board clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including but not limited to, overseeing cleanup and abatement efforts. . . . Upon failure of any person to comply with the cleanup or abatement order, the Attorney General, at the request of the board, shall petition the superior court for that county for the issuance of an injunction requiring the person to comply with the order. In the suit, the court shall have jurisdiction to grant a prohibitory or mandatory injunction, either preliminary or permanent, as the facts may warrant.

27. The Rubicon Trail is not adequately drained and maintained. Runoff from the trail has discharged, and has the potential to discharge sediment and other waste into waters of the state. There are human sanitation problems, soil contamination from metals, and water contamination from petroleum-based fluids. Thus, the Responsible Parties have caused or permitted waste to be discharged or deposited where it will be, or has the potential to be, discharged to waters of the state. The Responsible Parties have created or threaten to create a condition of pollution or nuisance.

The Background statement in the Hearing Procedure document for the Regional Board’s April 23, 2009, Order provides that “the Executive Officer has issued a draft Cleanup and Abatement Order (CAO) to El Dorado County and the United States Department of Agriculture (collectively, “Discharger”) alleging that the Discharger has caused or permitted, or threatens to cause or permit a condition of pollution and nuisance.” It is clear from this statement that the Order is based upon the condition of pollution or nuisance portion of CWC §13304(a), rather

than on the Petitioner's violation of water quality standards or requirements for point or nonpoint source discharges.

The Order does not identify a violation of any water quality standards or requirements by the Petitioner. Moreover, the Order does not require the Petitioner to attain any identified water quality standards or requirements that are capable of uniform application. Instead, the Order is based upon visual inspections of human waste (§ 14)³; contamination "likely" due to petroleum-based fluids (§ 15); relative estimates of sediment volume along trail segments near tributaries to Loon Lake and the Rubicon River (§ 16)⁴; and potential effects of sediment loading at one location, the Ellis Creek crossing (§ 17). The Order is silent about the impairment of water quality based upon objective standards and requirements for sediments, oil, or human waste.

In addition, the Order does not require the Petitioner to conduct a cleanup or abatement action to respond to the discharge of pollutants and contaminants that may be located at any specific location on the Rubicon Trail. Rather, the Order directs the Petitioner to develop management and maintenance plans and conduct management activities that are related to the public's use of the Trail.

Finally, the Order provides no objective basis to determine whether or when the Petitioner has met any identified water quality standards or requirements or otherwise complied with the Order. The Petitioner's compliance with the Order is left to the subjective judgment of the Regional Board staff to determine whether the Petitioner's management of the public use of the Rubicon Trail is sufficient.

Thus, the language in the nuisance/pollution portion of CWC §13304(a) and the language in the Order fall squarely within the state statutes and regulations that are outside the scope of the CWA's waiver of sovereign immunity. Similar to the state laws that the district court found were outside of the CWA's waiver provision in Kelley, this Order and the state law provisions it relies upon are directed to a general condition of pollution and nuisance caused by public use of a facility, the Rubicon Trail, that is not owned, operated, or maintained by the Petitioner. The Order is so vague and ambiguous that it does not even identify any specific locations along the Rubicon Trail with point or nonpoint source pollution discharges that are tied in a meaningful way to objective water quality standards or requirements. Furthermore, the

³ The Regional Board staff collected four water samples from just one location (Spider Lake). Of the four samples, only one tested positive for fecal coliform. It is unknown if this was due to humans or animals.

⁴ The rapid assessment sediment study performed by the Regional Board staff during July and August is the basis for this finding. The trail segments used as the basis for this study were not identified by the Board. The sediment volume along the trail segments was quantified by measuring the dust layer, and the Board staff used this as the basis for its estimates of an annual sediment discharge from just a one-mile portion of the trail.

Order does not require the Petitioner to meet any quantifiable standards or requirements that are subject to uniform application.

The Order does not identify any violation of nonpoint source pollution requirements under the State's program from any of the Petitioner's projects or activities. The State Water Resources Control Board executed a Management Agency Agreement with the Forest Service in which the Forest Service is designated as the water quality agency for NFS lands in California. The Management Agency Agreement establishes that the Forest Service's document entitled "Water Quality Management for National Forest System Lands in California" sets forth the practices and procedures for controlling nonpoint sources of pollution. Through these procedures, best management practices have been certified as adequate to protect water quality. The Petitioner implements best management practices and otherwise complies with the state's nonpoint source requirements. This is all that the Petitioner is required to do to comply with state requirements. The Order does not identify any facts or evidence showing that the Petitioner does not comply with California's nonpoint source pollution requirements for any of its projects or activities. Rather, the Order is based upon state law prohibiting a general condition of pollution and nuisance that is not tied to any uniformly applicable requirements or water quality standards.

The waiver of sovereign immunity in §1329(a) of the Clean Water Act requires that the Regional Board's regulation of the Petitioner under the CWC be tied to objective water quality standards or requirements. However, the Order is based upon a general condition of nuisance and pollution from public OHV use on the Rubicon Trail, a trail which the Petitioner does not own, operate, or maintain, rather than on the Petitioner's violation of any objective or quantifiable water quality standards and requirements of uniform application for point or nonpoint source pollution. Thus, the nuisance/pollution provision of CWC §13304(a) and the Order are outside the waiver of sovereign immunity in the CWA.

For the reasons explained above, the United States did not waive its sovereign immunity with respect to this Order and the provision of CWC §13304(a) that the Order is based upon. Absent a waiver of sovereign immunity, the Regional Board had no jurisdiction or authority to name the Petitioner a Responsible Party in the Order.

E. THE REGIONAL BOARD'S INCLUSION OF PETITIONER AS A RESPONSIBLE PARTY IN THE ORDER IS ARBITRARY, CAPRICIOUS, AND CONTRARY TO LAW BECAUSE PETITIONER DOES NOT OWN, OPERATE, OR MAINTAIN THE RUBICON TRAIL

As discussed above, the Rubicon Trail is a county road and the County has a right-of-way for the entire length of the trail. For the reasons set forth above, the Petitioner does not own, operate, or maintain the Rubicon Trail. The authority to maintain and control use of the Trail rests solely with the County. Thus, the Regional Board's decision to name the Petitioner as a Responsible Party in the Order is arbitrary, capricious, and contrary to law.

F. THE REGIONAL BOARD IMPROPERLY NAMED PETITIONER
BECAUSE THE ORDER IS OUTSIDE THE BOARD'S JURISDICTION AND
DIRECTS PETITIONER TO TAKE LAND MANAGEMENT ACTIVITIES

As discussed above, the Order does not direct the Petitioner to undertake a cleanup and abatement action. Rather, the Order directs the Petitioner to conduct management and maintenance plans for the Rubicon Trail and undertake land management and enforcement activities for NFS lands that are subject to the Regional Board's approval. To the extent that it requires the Petitioner to manage public use of the Rubicon Trail, the Order is contrary to law and in excess of the Regional Board's authority because the Petitioner does not own, operate, or maintain the Rubicon Trail.

The Regional Board's Order exceeds its authority because it improperly instructs the Petitioner how to manage NFS lands.⁵ Federal law commits the management of NFS lands within the Eldorado National Forest to the Petitioner. See, 16 U.S.C. §§551, 1604, and 1613.

The Order is based upon "the discharge of sediment and other wastes due to motorized use of the Rubicon Trail." Order, ¶ 1, at 8. Although framed in general terms of cleanup, the language of the Order requires the Petitioner to undertake land management actions and activities that the Board's Executive Officer must approve to comply with the Order. The Order does not direct the Petitioner to meet and attain specific and identified water-quality standards and requirements. The Order requires the Petitioner and the County to jointly prepare plans for the management of the Rubicon Trail, even though the Petitioner does not manage or maintain the Rubicon Trail. The Order requires the Petitioner to prepare a Rubicon Trail Saturated Soil Water Quality Protection Plan to address water quality impacts caused by vehicle use on the Rubicon Trail during saturated soil conditions and during over-the-snow travel.

The Order directs the Petitioner to submit a Maintenance Training Plan in 2009 and 2010 for training volunteers to ensure that road maintenance projects are implemented in accordance with County or Forest Service road maintenance specifications or their equivalent. Order, ¶ 1, at 8. The Petitioner does not maintain the Rubicon Trail; the County does. Moreover, the requirement to educate and train the public bears no reasonable nexus to the abatement of water quality. Nor does the Order's requirement that the County and the Petitioner settle their disputes regarding the Rubicon Trail.

The Order directs the Petitioner to submit a Long Term Management Plan for the Rubicon Trail that includes maintenance activities, education, enforcement, and seasonal closure; a trail use count; a requirement that the parties take the necessary actions to resolve land disputes and describe the actual location of the trail; a feasibility study for the installation of permanent toilet facilities along the trail; procedures to enforce the use of spill kits for containment of waste generated from vehicle use on the trail; identification of the kinds of law enforcement officers

⁵ For example, the Order directs the Petitioner to require that the public use human waste disposal kits and spill kits.

and the frequency of their patrols; funding for law enforcement; and collection of fees from trail users. Rather than requiring the Petitioner to control or abate water pollution, the Order directs the Petitioner's management of NFS lands and federal employees.

Even if CWC §13304(a) applied to the Petitioner, the Regional Board exceeded its authority in issuing this Order because this section limits the Regional Board's authority to ordering the cleanup "of the waste" or the abatement of "the effects of the waste." The language of this section is based upon an occurrence or threat of a specific occurrence of, or the threat of, a discharge of pollutants in a specific identifiable location. There is no language in CWC §13304 that allows the Regional Board to issue an Order that directs the Petitioner to take any of the actions discussed above, including developing future land management and maintenance plans; undertaking future management of public activities; undertaking future land management and enforcement activities; requiring the Petitioner and the County to settle land disputes; or requiring the Petitioner to obtain the Regional Board's approval for the Petitioner's management activities on NFS lands.

The Regional Board improperly named the Petitioner in the Order because the Order is outside of the Board's jurisdiction and exceeds its authority.

G. THE ORDER IS ARBITRARY AND CAPRICIOUS BECAUSE IT FAILS TO NAME PRIVATE LANDOWNERS

To the extent that the Petitioner is named in the Order because of its landowner status, it is arbitrary and capricious. The Petitioner and the County are ordered to "jointly cleanup and abate the impacts resulting from OHV use of the Rubicon Trail" and to "take all reasonable steps to cease the discharge of sediment and other wastes due to motorized use of the Rubicon Trail to waters of the state, including discharges to Gerle Creek, Ellis Creek, Loon Lake and its tributaries, and to the Rubicon River and its tributaries." Order, ¶ 1, at 8. Gerle Creek mostly crosses private lands, and the County proposes to construct a bridge on private lands. Discharges to Loon Lake and its tributaries are from segments of the trail that cross both NFS lands and private lands. In relation to the Rubicon River, the trail crosses primarily private lands. See Exhibit C.

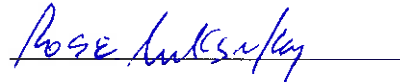
Based upon the water bodies identified by the Regional Board in the Order, the factual finding that the Rubicon Trail mostly crosses NFS lands is incorrect. Further, the Order does not provide any reasonable basis for naming the Petitioner as a Responsible Party but not any private landowners, when the condition of pollution that the Order specifically addresses occurs on private lands crossed by the Rubicon Trail. Because the Rubicon Trail crosses private lands with respect to the specific water bodies identified in the Order, naming the Petitioner and not any of the similarly situated private landowners is arbitrary and capricious.

H. CONCLUSION

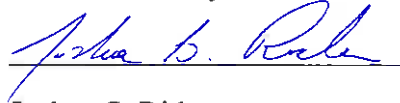
For the reasons explained above, the Regional Board erroneously named the Petitioner as a Responsible Party in Cleanup and Abatement Order No. R5-2009-0030. The State Board should modify the Regional Board's Order to remove the Petitioner as a named Responsible Party or direct the Regional Board to take this action.

DATED: May 21, 2009

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Rose Miksovsky", written over a horizontal line.

Rose Miksovsky

A handwritten signature in blue ink, appearing to read "Joshua S. Rider", written over a horizontal line.

Joshua S. Rider
Attorneys for Petitioner
USDA, Forest Service,
Eldorado National Forest



Linda S. Adams
Secretary for
Environmental
Protection

California Regional Water Quality Control Board Central Valley Region

Karl E. Longley, ScD, P.E., Chair

11020 Sun Center Drive #200, Rancho Cordova, California 95670-6114
Phone (916) 464-3291 • FAX (916) 464-4645
<http://www.waterboards.ca.gov/centralvalley>



Arnold
Schwarzenegger
Governor

30 April 2009

CERTIFIED MAIL

7008 1140 0002 8805-4745

Mr. Ed Knapp, Chief Assistant County Counsel
El Dorado County
330 Fair Lane
Placerville, CA 95667

CERTIFIED MAIL

7008 1140 0002 8805 4738

Mr. Jeffrey Vail, Acting Forest Supervisor
Eldorado National Forest
100 Forni Road
Placerville, CA 95667

NOTICE

ADOPTED CLEANUP AND ABATEMENT ORDER FOR EL DORADO COUNTY AND THE UNITED STATES DEPARTMENT OF AGRICULTURE, FOREST SERVICE, ELDORADO NATIONAL FOREST RUBICON TRAIL EL DORADO COUNTY

Cleanup and Abatement Order (CAO) No. R5-2009-0030 for the above-named responsible parties was adopted by the Central Valley Regional Water Quality Control Board (Central Valley Regional Board) on 23 April 2009.

Please note that several submittals required by the CAO are due in the next few months. The first submittal is the first Quarterly Update for the *Rubicon Trail Saturated Water Quality Protection Plan* and the *Long Term Management Plan for the Rubicon Trail* that is due on 30 June 2009 and described in Item 7 of the CAO. The second required submittal is the *2009 Maintenance Training Plan* that is due by 15 July 2009 and described in Item 4 of the CAO. A number of additional submittals are required throughout the year; please refer to the attached CAO for due dates.

In order to conserve resources, this letter transmits paper copies of the documents to the Responsible Parties only. Interested persons may download the documents from the Regional Water Board's Internet website at:

[http://www.waterboards.ca.gov/centralvalley/board_decisions/adopted_orders/]. Copies of these documents can also be obtained by contacting or visiting the Central Valley Water Board's office weekdays between 8:00 AM and 5:00 PM.

California Environmental Protection Agency



EXHIBIT A

If you have any questions regarding the CAO, please contact Marty Hartzell at (916) 464-4630 or at mhartzell@waterboards.ca.gov.



WENDY WYELS, Supervisor
Compliance and Enforcement Section

Enclosure: CAO Order (Responsible Parties Only)

cc w/o enc: Steve Davey, Chief of Staff for Assembly Member Gaines, Sacramento
Reed Sato, Office of Enforcement, SWRCB, Sacramento
Patrick Pulupa, Office of the Chief Counsel, SWRCB, Sacramento
Lori Okun, Office of the Chief Counsel, SWRCB, Sacramento
Supervisor Ron Briggs, El Dorado County Board of Supervisors, Placerville
Supervisor Jack Sweeney, El Dorado County Board of Supervisors, Placerville
Tom Celio, Deputy Director, El Dorado County DOT, Placerville
Diane Rubiaco, Pacific Ranger District, Pollock Pines
Daphne Greene, State Parks OHV Recreation Division, Sacramento
Todd Gardner, CA Department of Fish and Game, Rancho Cordova
Karen Schambach, PEER, Georgetown
Rich Platt, Natural Resources Consulting, Pollock Pines
Monte Hendricks, Pollock Pines
Randy Burleson, Rubicon Trail Foundation, Fair Oaks
John Arenz, Rubicon Trail Foundation, Pollock Pines
Del Albright, Friends of the Rubicon, Mokelumne Hill
Pearse Umlauf, National Off-Road Association, Georgetown

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

CLEANUP AND ABATEMENT ORDER NO. R5-2009-0030
FOR

EL DORADO COUNTY
AND THE
UNITED STATES DEPARTMENT OF AGRICULTURE, FOREST SERVICE,
ELDORADO NATIONAL FOREST
RUBICON TRAIL
EL DORADO COUNTY

This Order is issued to El Dorado County and the U.S. Department of Agriculture, Eldorado National Forest (hereafter "Dischargers" or "Responsible Parties") based on provisions of California Water Code (CWC) sections 13304 and 13267 which authorize issuance of Cleanup and Abatement Orders and the requirement to submit technical reports.

The Central Valley Regional Water Quality Control Board (Central Valley Water Board) finds, with respect to the Responsible Parties' acts, or failure to act, the following:

1. The Rubicon Trail is an internationally known, historic off-highway vehicle (OHV) route that crosses the Sierra Nevada Mountains, connecting the town of Georgetown in El Dorado County to Homewood on the west side of Lake Tahoe. The Rubicon Trail ranges in condition from a well-defined dirt road to granite domes, ledges, and rock debris that create moderate to difficult passage for street legal vehicles and OHVs.
2. There are currently two access points to the Rubicon Trail. The historic access originates at the Airport Flat Campground and extends easterly through the Wentworth Springs Campground to Ellis Creek. A second access, known as the Ellis Creek Intertie, starts at the Loon Lake Dam and extends in a northerly direction to its intersection with the trail near Ellis Creek. From that point, the trail runs easterly to the Little Sluice Box-Spider Lake area and the Buck Island Reservoir area, then northerly through the Rubicon Springs area to the El Dorado/Placer County line. This Order only addresses the portion of the Rubicon Trail within El Dorado County.
3. The majority of the Rubicon Trail crosses land owned by the United States, with a few shorter segments of the trail crossing land owned by private parties. El Dorado County, through its Department of Transportation (DOT), currently conducts maintenance operations and is planning improvements to the Rubicon Trail, while the United States is the primary owner of the land on either side of the trail and holds title to most of the land underlying the Rubicon Trail right-of-way. Many trail users park their vehicles and camp on land managed by the U.S. Forest Service. The trail also passes through some private land, over which El Dorado County has jurisdiction.

4. Pursuant to federal Revised Statute 2477, El Dorado County (County) asserted a right-of-way over federal land through an 1887 declaration; this right-of-way is known as the Rubicon Trail. In its adoption of Resolution 142-89 on 30 May 1989, the El Dorado County Board of Supervisors reaffirmed the 3 August 1887 declaration, and declared that the Rubicon Trail is a non-maintained public road in El Dorado County. The portion of the trail from Airport Flat Campground to Wentworth Springs Campground has been accepted into the County's maintained road system. For the Ellis Creek Intertie portion of the trail, the County has been granted deeded easements by the U.S. Forest Service and a private property owner.

BACKGROUND

5. The Rubicon Trail is open to OHV use throughout the year. The highest OHV trail use is during weekends and holidays between Memorial Day and Labor Day; however, OHV users also drive the trail when it is covered by snow and at times when saturated soil conditions exist during spring snowmelt and fall rains. Although OHV users groups hold workdays to maintain the trail, large segments of the trail are severely eroded, allowing runoff from rainfall and snowmelt events to discharge sediment to waters of the state. The trail has become incised due to the heavy use, and water from rainfall and snowmelt events is intercepted by the incised trail then transported along with sediment to stream crossings. Water also collects in large puddles and mud bog depressions in many locations along the trail. OHVs are driven through these mud bogs, thereby accelerating trail erosion and sedimentation of water bodies. Many of these puddles and bogs become hydrologically connected to the stream network when trail runoff exceeds the capacity of the depression.
6. Multiple OHV user groups, including the Rubicon Trail Foundation (RTF) and the Friends of the Rubicon (FOTR), have volunteered countless hours to repair, maintain, and clean up the trail. El Dorado County and the Eldorado National Forest have provided assistance for the OHV groups by organizing volunteer efforts and providing materials for trail maintenance. According to the County, it has received over \$700,000 in grant funding from the Off Highway Motor Vehicle Recreation Division of the State Department of Parks and Recreation (OHMVR Division), in addition to grants from other agencies such as the Integrated Waste Management Board and the Highway Bridge Program. According to the OHMVR Division, it has provided over \$1.2 million in grants between 1984 and 2006 for the El Dorado County portion of the trail.

These funds have been used for activities such as purchasing personal sanitation units and spill kits to distribute to the trail users, production of educational material, purchase of a law enforcement vehicle and paying for patrol time by law enforcement officers, consultant services for preparation of a master plan, land surveys, and the design, planning, and construction (anticipated in 2010) of two bridges. The County has also used its own funds and staff to perform trail maintenance work.

7. According to the Eldorado National Forest, it has taken actions over the last two decades to control the discharge of sediment and other pollutants from the National Forest lands adjacent to the Rubicon Trail, including (a) restoring impacted areas along the Ellis Creek intertie and near Ellis Creek, (b) working cooperatively with El Dorado County to obtain the permit needed for the installation of the toilet at the Loon Lake trailhead, (c) providing summer time law enforcement patrols along the Rubicon Trail and adjacent National Forest lands, (d) assisting OHV groups by providing material for trail maintenance, as well as coordinating and training volunteers, (e) providing a cabin to be used as an information station at the Loon Lake trailhead, (f) and issuing a Travel Management decision which prohibits motor vehicles from traveling off of roads or trails within the Eldorado National Forest and establishes a minimum seasonal closure period for native surface roads and trails from January 1 through March 31 of each year. The Travel Management decision does not apply to the Rubicon Trail because it has been declared an El Dorado County unmaintained road.

EL DORADO COUNTY PLANNING PROCESS

8. The Rubicon Oversight Committee (ROC) was established by the County in June 2002. It currently operates as an advisory body to the El Dorado County Department of Transportation and provides an opportunity for OHV user groups to coordinate their volunteer activities with the County. The ROC has met on a monthly basis since its formation and its members have worked on a variety of Rubicon Trail issues such as signage, winter use, sanitation, and the master planning process.
9. In June 2003, the El Dorado County contracted with Environmental Stewardship and Planning; Incorporated to conduct multiple workshops and prepare multiple interim documents that would become the basis for a Draft Environmental Impact Report (EIR) for the Rubicon Trail.
10. On 9 October 2007, El Dorado County distributed the Draft EIR with alternatives for the Rubicon Trail Master Plan for public review and comment. In the Draft EIR, El Dorado County identified the following tasks under Alternative A:
 - a) Water runoff best management practices (BMPs) would be implemented on the trail;
 - b) Annual monitoring reports of soil and water sampling along the trail would be provided to the Central Valley Water Board and Department of Toxic Substances Control, and should any observed values exceed concentration limits established in coordination with oversight agencies, El Dorado County would work with appropriate agencies to determine remediation and monitoring activities to mitigate identified contamination; and
 - c) The trail would be closed to recreational vehicles from November 1 to April 30 if El Dorado County and Rubicon Oversight Committee representatives determined that there is a potential for soil erosion to occur during saturated soil conditions.

The "No Project" and the "Alternative B" project alternatives of the Draft EIR do not ensure the implementation of these mitigations. Alternative B included several elective plan actions that the County could consider for implementation if adopted and identified fewer management responsibilities than Alternative A. Alternative B contained the following elective elements as resources allowed: water quality monitoring; an ordinance proclaiming that trail modification without the written approval, and authorization from, the County DOT would be in violation of the County Code; and trail and drainage improvement projects.

11. In September 2008, the El Dorado County staff informed the Water Board that work on the EIR/Master Plan process has stopped because of budget constraints and that there are no plans to reinstate the process. A final EIR/Master Plan for the Rubicon Trail has not been completed to date. The County now contends that it lacks the legal authority and/or legal obligation to implement some of the measures described in the Draft EIR on some sections of the Trail.
12. In the spring of 2008, El Dorado County began negotiations with the OHMVR Division and the California Geological Survey to complete a comprehensive survey of the Rubicon Trail, as related to erosion and sedimentation processes. The County will use this survey, expected to be released in April 2009, as the basis for a comprehensive maintenance plan for the Rubicon Trail. In addition, the survey will be a location-based repository for the information about Trail conditions as they evolve over time.

ENVIRONMENTAL IMPACTS

13. In July 2004, the El Dorado County Board of Supervisors issued a state of local emergency due to the significant amount of human fecal waste littered around the Spider Lake area. The amount of fecal waste was determined to pose a health and safety threat to users of the trail and to streams and lakes that are tributary to the Rubicon River and the Middle Fork American River. At the same time, the Eldorado National Forest Supervisor issued a Forest Order closing the National Forest System lands around Spider Lake. As a result, the Spider Lake area was closed to camping and all human access.
14. Through the cooperation of the Responsible Parties and trail user organizations, a vault toilet was installed at the Loon Lake Trailhead in October 2008. Currently, restroom facilities exist at each trailhead, but there are no public sanitation facilities along the Rubicon Trail or at the Ellis Creek, Spider Lake, or Buck Island Reservoir primitive camping areas. Privately-owned sanitation facilities may be available to Trail users in the Rubicon Springs area. Otherwise, once in the backcountry, trail users must rely on individual human waste disposal methods. Trail volunteers and County staff have provided human waste "WAG Bags" free of charge to trail users since 2003; however, the Responsible Parties have not initiated a program to require the use or tracking of the Wag Bags to determine if individual human waste disposal methods are working. A

human waste study conducted in 2001 estimates that 8,000 gallons/year of human waste are deposited on public land along the Rubicon Trail. During trail evaluations in July and August 2008, Water Board staff observed multiple areas along the trail with visible human excrement and toilet paper.

15. Section 3.6 of the County's Draft EIR provides details of preliminary water quality monitoring along the Rubicon Trail. Following a sampling effort in the summer of 2005, low levels of oil and grease were identified in water and soil samples collected along the Rubicon Trail, and low levels of copper and cadmium were identified in soil samples. This contamination is likely due to motor oil, grease, and other petroleum-based fluids spilling and leaking from OHVs that have overturned or have damaged mechanical components while traversing rocky segments of the trail. One water sample from Spider Lake also tested positive for fecal coliform following a high-use weekend in June.
16. Central Valley Water Board staff completed a rapid assessment sediment study along the Rubicon Trail during July and August 2008. Staff identified a few segments of the Rubicon Trail that are hydrologically connected to watercourses tributary to Loon Lake and the Rubicon River, and provided a relative estimate of the sediment volume along these trail segments by measuring the dust layer. With this information, staff made an order of magnitude estimation that between 60 and 80 cubic yards of sediment is being delivered from one mile of hydrologically connected trail to waters of the state annually. This estimate is an order of magnitude greater than sediment production rates from light traffic native surfaced roads and is within the same order of magnitude to other OHV trail production rates available in the literature. The draft sediment study is currently undergoing peer review.
17. Board staff also completed a pebble count survey at the Ellis Creek crossing of the Rubicon Trail and identified that the influx of sediment into this perennial fish-bearing stream is causing a fining of bed material downstream of the crossing. This increased sediment load can fill spawning gravels and reduce aquatic habitat, and has the potential to carry contaminants from vehicle operations on the trail into waters of the state.
18. The Erosion Study concludes that there is erosion of sediment from portions of the Rubicon Trail and that some of that eroded sediment enters surface waters. The pebble count indicates that, at one location, there were more fine bottom sediments downstream of the Trail than upstream of the Trail, possibly indicating an impact of Trail sediments on the streambed. The methodologies used in the study have been questioned by several commenters; however, the Study's conclusions that erosion of sediment from the Trail to streams is well corroborated by other evidence in the record, including photographic evidence. The quantification of that erosion at the specific locations and conditions in the Study are not critical to the Board's findings on this issue.
19. An accurate count, accepted by all of the user groups, of the number of the annual or seasonal users on the Rubicon Trail has not been completed to date. User counts and estimates vary widely. An accurate count of trail users is necessary for the Responsible

Parties to adequately manage the Rubicon Trail, especially with regard to the issue of human waste.

LEGAL CONSIDERATIONS

20. Due to the 1887 RS 2477 declaration (mentioned in Finding 4, *supra*), the Forest Service claims that it has limited ability to regulate El Dorado County's activities on this road, and therefore El Dorado County is responsible for operations and maintenance of the Trail. El Dorado County makes similar claims relative to its responsibility of the Trail, stating that because it does not hold a property interest in the trail, all of the activities it has thus far undertaken on the Trail have been completely voluntary. However, from the perspective of the Central Valley Water Board, it is clear that these two parties share primary responsibility for maintenance and management of the Trail.
21. A legal easement for the Rubicon Trail has not been recorded except for the portion from the Loon Lake Dam to near Ellis Creek (known as the Ellis Creek Intertie). Other than the Ellis Creek Intertie, the exact location and width of the Rubicon Trail has not been fully defined.

REGULATORY CONSIDERATIONS

22. The El Dorado County portion of the Rubicon Trail is at an elevation of 5,400 feet to 7,000 feet and traverses the eastern portion of the Sierra Nevada mountain range. This trail intersects the headwaters of Gerle Creek, Ellis Creek, and parts of the Rubicon River. Surface drainage is toward the south and west and is within the Middle Fork American River watershed, and via the Loon Lake diversions, also within the South Fork American River watershed.
23. The Water Quality Control Plan, Fourth Edition, for the Sacramento River Basin and the San Joaquin River Basin (hereafter Basin Plan), designates beneficial uses, establishes water quality objectives, and contains implementation plans and policies for all waters of the Basin.
24. The designated beneficial uses of the Middle Fork American River (source to Folsom Lake), as specified in the Basin Plan, are municipal and domestic supply, irrigation, stock watering, power, contact and non-contact water recreation, warm and cold freshwater habitat, coldwater spawning, and wildlife habitat. The designated beneficial uses of the South Fork American River (source to Placerville), as specified in the Basin Plan, are municipal and domestic supply, power, contact and non-contact water recreation, warm and cold freshwater habitat, coldwater spawning, and wildlife habitat. Gerle Creek, Ellis Creek, Loon Lake, and the Rubicon River, as tributaries to the Middle Fork and South Fork American River, share these beneficial uses.

25. The California Department of Fish and Game has identified at least seven fish species and one frog species as among the terrestrial and aquatic species that have known habitat in the Rubicon Trail area and are at risk from water quality impacts.

26. CWC section 13304(c)(1) provides that:

Any person who has discharged or discharges waste into waters of this state in violation of any waste discharge requirements or other order or prohibition issued by a Regional Water Board or the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the Regional Water Board clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including but not limited to, overseeing cleanup and abatement efforts. ... Upon failure of any person to comply with the cleanup or abatement order, the Attorney General, at the request of the board, shall petition the superior court for that county for the issuance of an injunction requiring the person to comply with the order. In the suit, the court shall have jurisdiction to grant a prohibitory or mandatory injunction, either preliminary or permanent, as the facts may warrant.

27. The Rubicon Trail is not adequately drained and maintained. Runoff from the trail has discharged, and has the potential to discharge, sediment and other waste into waters of the state. There are human sanitation problems, soil contamination from metals, and water contamination from petroleum-based fluids. Thus, the Responsible Parties have caused or permitted waste to be discharged or deposited where it will be, or has the potential to be, discharged to waters of the state. The Responsible Parties have created or threaten to create a condition of pollution or nuisance.

28. CWC section 13267(b) provides that:

In conducting an investigation specified in subdivision (a), the Regional Water Board may require that any person who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge waste within its region, or any citizen or domiciliary, or political agency or entity of this state who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge waste outside of its region that could affect the quality of waters of the state within its region shall furnish, under penalty of perjury, technical or monitoring program reports which the Regional Water Board requires. The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports.

29. The technical reports required by this Order are necessary to assure compliance with this Order, and to protect human health and the environment. Existing data and information about the site indicates that waste has been discharged and will continue to be discharged along the Rubicon Trail, which is currently managed by the Responsible Parties.

30. The issuance of this Order is an enforcement action taken by a regulatory agency and is exempt from the provisions of the California Environmental Quality Act (CEQA) (Pub. Resources Code § 21000 et seq.), pursuant to California Code of Regulations, title 14, section 15321(a)(2). The implementation of this Order is also an action to assure the restoration of natural resources and/or the environment and is exempt from the provisions of the CEQA, in accordance with California Code of Regulations, title 14, sections 15307 and 15308.

IT IS HEREBY ORDERED THAT, pursuant to CWC sections 13304 and 13267, El Dorado County and the Eldorado National Forest (hereafter "Dischargers" or "Responsible Parties") shall jointly cleanup and abate the impacts resulting from OHV use of the Rubicon Trail in accordance with the scope and schedule set forth below.

1. The Responsible Parties shall take all reasonable steps to cease the discharge of sediment and other wastes due to motorized use of the Rubicon Trail to waters of the state, including discharges to Gerle Creek, Ellis Creek, Loon Lake and its tributaries, and to the Rubicon River and its tributaries. This includes, but is not necessarily limited to, implementing all of the following actions. These actions shall apply to lands which are within the watersheds of the surface water bodies described above.
2. By **1 October 2010**, the Responsible Parties shall prepare a *Rubicon Trail Saturated Soil Water Quality Protection Plan*, which shall evaluate, and where appropriate, propose means of addressing, water quality impacts caused by vehicle use (excluding snowmobiles) during saturated soil conditions and by over-the-snow travel. This plan must clearly show how its implementation will protect water quality by minimizing or preventing the mobilization of sediment to surface waters. The plan should consider, as one way of addressing water quality impacts, a seasonal closure involving hard dates (similar to those used in most portions of the Eldorado National Forest) or dates that are dependant upon weather conditions (such as the Eldorado National Forest's Rock Creek closure method). In addition, the plan must propose an education component, an implementation component, and an enforcement component. Upon approval by the Executive Officer, the plan shall be immediately implemented.

Maintenance-related activities for 2009

3. El Dorado County shall continue to implement the following items, which it has previously committed to complete during 2009:
 - a) Installing water breaks, cross drains and rock filled rolling dips on a 2,000 foot section of the Rubicon Trail just west of the Ellis Creek Crossing;
 - b) Dispensing wag bags and cardboard commodes at the Loon lake Trailhead in cooperation with Rubicon Trail Foundation volunteers;

- c) Installing educational signage at Loon Lake Trailhead and Wentworth Springs campground to encourage "pack it in, pack it out" and the use of wag bags on the trail; and
 - d) Continuing with preliminary engineering and environmental review for the construction of bridges at Gerle Creek and Ellis Creek. The County shall take all reasonable steps to ensure that permitting activities take place by the fall of 2009, that the construction contract shall be out to bid in the spring of 2010, and that construction will begin in the summer of 2010.
4. By **15 July 2009**, the Responsible Parties shall submit a *2009 Maintenance Training Plan* describing procedures for training County, Federal, and volunteer groups to ensure that Rubicon Trail maintenance projects planned for the 2009 season will be installed to County or Forest Service road maintenance specifications (or equivalent).
5. By **15 July 2010**, the Responsible Parties shall submit a *2010 Maintenance Training Plan* describing procedures for training County, Federal, and volunteer groups to ensure that Rubicon Trail maintenance projects planned for the 2010 season will be installed to County or Forest Service road maintenance specifications (or equivalent).

Long Term Management Plan

6. By **30 April 2011**, the Responsible Parties shall submit a *Long Term Management Plan for the Rubicon Trail* which shall address the following minimum information, and shall implement paragraphs (e), (f) and (i) by **30 April 2011**:
- a) A clear definition of each party's responsibilities for the Rubicon Trail, including maintenance activities, education, enforcement, seasonal closure, and all other actions necessary to protect water quality.
 - b) The results of a Trail Use Count that shall be conducted during 2009 and/or 2010. The results shall describe the expected annual use of the Rubicon Trail, both in terms of vehicles and people.
 - c) An estimate of the number of people and vehicles who can use the Rubicon Trail, in its current condition, without adversely impacting water quality due to sediment, human waste, or petroleum discharges. Using this estimate and the Trail Use Count, determine whether there is a need to restrict use of the trail to protect water quality. Alternatively, determine whether certain specific improvements will result in the ability for the current number (or an increased number) of people and vehicles to use the trail without impacting water quality. If so, describe those improvements and provide a proposed timeline for their implementation.
 - d) Documentation of the actual location of the Rubicon Trail within El Dorado County, including the centerline and an agreed-upon width from each side of that line. The

documentation shall be in a form that shall be easily understood by both the public and law enforcement officials.

- e) A strategy to address human waste management on the Rubicon Trail. At a minimum, the Responsible Parties must effectively communicate to users the importance of using portable human waste collection devices and WAG bags. The Responsible Parties must also consider the use of portable human waste collection devices and "WAG" bags. This section must contain a feasibility study for installation of permanent toilet facilities along the trail, including information as to how human waste will be removed from the toilets and disposed of. The plan must also contain procedures for annually removing human waste that has been deposited on the ground, where feasible. If the annual human waste inspection does not show significant improvements, then the Responsible Parties must evaluate reducing the number of people using the trail.
- f) Procedures to enforce the use of spill kits for containment of liquid and solid wastes generated from vehicle use on the Rubicon Trail, as well as procedures for annually removing or mitigating petroleum contaminated soils and rocks, where feasible, on the trail.
- g) A discussion of the type of law enforcement officers and the frequency of their patrols that are needed to enforce trail regulations in regard to water quality. Evaluate options for providing this level of law enforcement, including funding from the Responsible Parties, an agreement with the OHMVR Division, partnering with OHV user groups, applying for grant funds, and the feasibility of collecting fees from the trail users.
- h) A discussion of the annual cost to implement the Long Term Management Plan and the Saturated Soil Water Quality Protection Plan. An evaluation of funding options shall be discussed, including a cooperative agreement with the OHMVR Division, availability of grant funds, and the feasibility of collecting fees from the trail users.
- i) A Construction and Maintenance Procedures Plan that shall contain (a) operating procedures for constructing, maintaining, and/or decommissioning drainage structures, stream crossings, and trail segments, and (b) procedures for training County, Federal, and volunteer groups to ensure that this work is completed to County or Forest Service road maintenance specifications (or equivalent).

Periodic Reports

7. Beginning **30 June 2009 and continuing through 30 December 2010**, the Responsible Parties shall submit quarterly updates describing the progress that has been completed to prepare the *Rubicon Trail Saturated Soil Water Quality Protection Plan* and the *Long Term Management Plan for the Rubicon Trail*.

8. By **15 December of each year (beginning in 2009)**, the Responsible Parties shall submit an *Annual Rubicon Trail Summary* describing trail and maintenance activities, educational activities, and enforcement activities completed during the previous season. The report shall also include (a) the results of an on-the-ground inspection taken after Labor Day to estimate the amount and general locations of human waste present on the trail, and (b) the results of an on-the-ground inspection taken after Labor Day to estimate the amount and general locations of petroleum products present along the trail. These results shall be compared to the results obtained during previous years. The report shall document the amount of human waste that has been picked up off the ground and removed from the trail area each fall, as well as the amount of petroleum contaminated soil which has been removed and/or remediated each fall. Finally, the report shall clearly describe the law enforcement presence on the trail during the year.
9. By **15 May of each year (beginning in 2010)**, the Responsible Parties shall submit an *Annual Trail Maintenance and Activities Plan* that lists the projects to be completed during the upcoming field season, including those projects proposed to be completed by volunteer groups. The report shall also evaluate the previous year's success in preventing and or removing the deposition of human waste and petroleum products, report on the status of projects described in the prior year's plan, and if needed to protect water quality, shall propose additional management practices for the upcoming season.
10. By **15 July of each year (beginning in 2011)**, the Responsible Parties shall submit an *Annual Review of the Saturated Soil Water Quality Protection Plan*. The report shall describe the steps taken to implement the Plan during the previous winter, how successful the implementation was in terms of protecting water quality, the types of enforcement activities to ensure the success, and any proposed changes for the next winter.

Three years after full implementation of the *Long Term Management Plan*, Water Board staff will evaluate (a) whether the Responsible Parties have taken all reasonable steps to protect water quality and (b) whether activities on the Rubicon Trail still impact, or threaten to impact, water quality. Using this information, staff will evaluate whether this Order should be rescinded.

If the Responsible Parties are unable to perform any activity or submit any document in compliance with the schedule set forth herein, or in compliance with any work schedule submitted pursuant to this Order, the Responsible Parties may request, in writing, an extension of the time specified. The extension request shall include justification for the delay. Any extension request shall be submitted as soon as the situation is recognized and no later than the compliance date. An extension may be granted by revision of this Order or by a letter from the Executive Officer. Extension requests not approved in writing by the Executive Officer with reference to this Order are denied.

In accordance with California Business and Professions Code sections 6735, 7835, and 7835.1, engineering and geologic evaluations and judgments shall be performed by or under

the direction of registered professionals competent and proficient in the fields pertinent to the required activities. All technical reports specified herein that contain workplans for, that describe the conduct of investigations and studies, or that contain technical conclusions and recommendations concerning engineering and geology shall be prepared by or under the direction of appropriately qualified professional(s), even if not explicitly stated. Each technical report submitted by the Responsible Parties shall contain the professional's signature and/or stamp of the seal.

Any person signing a document submitted under this Order shall make the following certification: *"I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all attachments and that, based on my knowledge and on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment."*

If, in the opinion of the Executive Officer, the Responsible Parties fail to comply with the provisions of this Order, the Executive Officer may refer this matter to the Attorney General for judicial enforcement or may issue a complaint for administrative civil liability. Administrative Civil Liability of up to \$10,000 per violation per day may be imposed pursuant to the CWC sections 13268, 13350, and/or 13385. The Central Valley Water Board reserves its right to take any enforcement actions authorized by law.

Any person aggrieved by this action of the Central Valley Regional Water Board may petition the State Regional Water Board to review the action in accordance with CWC section 13320 and California Code of Regulations, title 23, sections 2050 and following. The State Regional Water Board must receive the petition by 5:00 p.m., 30 days after the date of this Order, except that if the thirtieth day following the date of this Order falls on a Saturday, Sunday, or state holiday, the petition must be received by the State Regional Water Board by 5:00 p.m. on the next business day. Copies of the law and regulations applicable to filing petitions may be found on the Internet at: http://www.waterboards.ca.gov/public_notices/petitions/water_quality or will be provided upon request.

I, Pamela C. Creedon, Executive Officer, do hereby certify the foregoing is a full, true, and correct copy of an Order adopted by the Central Valley Regional Water Quality Control Board, on 23 April 2009.



PAMELA C. CREEDON, Executive Officer

United States Department of Agriculture
Office of the General Counsel

Pacific Region—San Francisco Office
33 New Montgomery, 17th Floor
San Francisco, CA 94105-4511

Telephone: 415-744-3158
Facsimile: 415-744-3170
Internet: rose.miksovsky@usda.gov

May 19, 2009

Pamela Creedon, Executive Officer
Regional Water Quality Control Board
Central Valley Region
11020 Sun Center Drive #200
Rancho Cordova, CA 95670-6114

RE: Cleanup and Abatement Order No. R5-2009-0030

Dear Ms. Creedon:

On April 23, 2009, the Central Valley Regional Water Quality Control Board issued Cleanup and Abatement Order No. R5-2009-0030 ("Order") to El Dorado County and the United States Department of Agriculture, Forest Service, Eldorado National Forest ("Forest Service"). On behalf of the Forest Service, I hereby request that the administrative record for this Order be prepared and delivered to the State Board, including a copy of the transcript of the proceeding.

Very truly yours,

Rose Miksovsky
Staff Counsel

cc: Ed Knapp, Chief Asst. County Counsel for
El Dorado County
Ramiro Villalvazo, Forest Supervisor Eldorado National Forest
Diane Rubiaco, District Ranger Pacific Ranger District, Eldorado National Forest

... B ...

James R. "Jack" Sweeney

Land Surveyor - Land Use Consultant

tele 530-622-5653

e-mail jacktoni@innercite.com

fax 530-295-9202

P.O. Box 409

Diamond Springs, CA 95619

January 9, 2002

My thoughts which I hope to use as a basis for discussing this matter with others interested in saving the Rubicon Trail for future users.

re: Saving the Rubicon Trail

To interested parties:

After more than fifty years of motorized use by the public, the Rubicon Trail has come under attack by parties that conclude the trail and surrounding environment are being abused. Complaints have been made to the United States Forest Service (USFS) since they control most of the land in the area.

The County of El Dorado has gotten involved since the trail is actually a County Road. Under my sponsorship as a member, the Board of Supervisors on May 30, 1989 unanimously adopted resolution number 142-89 which reaffirmed that the "Rubicon Trail" was an un-maintained county highway and had been since a declaration by a previous Board August 3, 1887 which was recorded in Book 851 at page 416 Official Records of the County of El Dorado.

At issue with the USFS is the location of the Rubicon Trail. They alledge that the Rubicon Trail goes from Wentworth Springs to Spider Lake and on to Rubicon Springs and thence to Homewood or Tahoma. While the resolution 142-89 states that the Loon Lake to Ellis Creek trail was a part of the original, the USFS disagees and may be correct. However, with the assistance of County staff members Carl Weiland of Parks and Recreation and Ed Knapp of County Counsel, we have convinced the USFS that rather than argue we should find a solution. They concur and would be willing to grant the County an Easement for road purposes.

Rubicon Jeep Road.wps
4/15/02 10:09 AM

C

However, the story does not end that easily. The USFS would like to see a survey made of the trail and its location related to public and private ownership lines. By having the relationship between the road and private and public lands defined, appropriate rules of use could be applied. With that information the "authorities" would be able to sanction individuals that are acting inappropriately and stop abuse of the trail.

There is also a great need to abandon a newer alternative portion of the trail where it cuts off from the old trail and crosses the upper reaches of Loon Lake through a mud flat and a treed area. The old trail in the area simply needs a little brush removal and the new trail or shortcut needs some blockage. There are also issues of needed repairs to washed out areas and to creek crossings; especially at Ellis Creek. There is no desire on the part of the parties to create a road that is not a challenge to four wheeling; simply to repair the road to a state that is less threatening to the environment.

Lastly, there must be some resolution to the elimination of human waste along the trail. This may be accomplished by placement of toilet facilities along the trail; but this seems a most expensive option. There are a variety of methods available to have individuals be responsible for containing their individual waste and taking it with them to a suitable disposal area. This idea needs some exploring.

We believe that all of these things can be accomplished without any environmental impact reports and therefore would not bring forth the controversies found in the efforts made over the Rock Creek Trail.

In order to obtain the best solutions to all of the problems there will need to be a series of meetings of user groups in order to have buy in of all users. Through such meetings we can reach agreement as to what the problems are and what might be acceptable solutions.

There will be an effort to provide a survey of the area by the El Dorado County Surveyors, Architects, Geologists, and Engineers (SAGE). It is hoped that some of the existing four wheel drive organizations will join with SAGE and provide transportation and meals for the survey expedition.